UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GABRIAL DIAB,

Plaintiff,

v.

TEXTRON, INC., TEXTRON FASTENING SYSTEMS, INC., TFS FASTENING SYSTEMS LLC, & ACUMENT FASTENING SYSTEMS LLC,

Defendants.
_____/

Case No. 07-11681

HONORABLE SEAN F. COX
United States District Judge

OPINION & ORDER DENYING DEFENDANTS' MOTION TO STRIKE [Doc. No. 69]

On June 2, 2009, Defendants filed their "Motion to Strike Plaintiff's Expert Witness and His Written Opinion." [Doc. No. 69]. Defendants argue that, "[b]ecause the Court has ruled that the parties cannot introduce any evidence concerning other documents . . .that governed Diab's right to receive the stock options, Defendants ask this Court to prohibit Plaintiff from calling his expert witness, Mr. Barry Grant." [Def.'s Br., Doc. No. 69, p.2]. The parties have fully briefed the issues, and as the motion is without merit, the Court declines to hear oral argument pursuant to Local Rule 7.1(e)(2). For the reasons that follow, the Court **DENIES** Defendant's motion [Doc. No. 69]

BACKGROUND

On June 30, 2008, the Defendants moved for summary judgment [Doc. No. 47] on Diab's

claims of beach of contract and promissory estoppel.[1] The Court, in an Opinion & Order dated November 6, 2008, held that there was a contract between the parties which entitled Diab to receive annual grants of stock options:

> Diab and Textron each agree that the September 27, 2001 hiring letter to Diab is a contract, that its terms are unambiguous, and that the language of the Contract controls any rights Diab may have to stock options. This Court finds the plain language of the Contract grants Diab the right to receive stock options at his election. . .

[November 6, 2008 Opinion & Order, Doc. No. 56, pp.6-7].

Seeking to prevent the Defendants from proffering evidence at trial "that there is no contract and/or that the contract does not require payment of stock options," Diab filed a motion *in limine* [Doc. No. 65] on May 1, 2009. The Court granted Diab's motion on May 28, 2009 [Doc. No. 68], holding as follows:

> The Court EXCLUDES FROM EVIDENCE at trial any information denying the existence of a contract between Diab and the Defendants; EXCLUDES FROM EVIDENCE at trial any information denying that the contract required the Defendants to pay annual options to Diab; and EXCLUDES FROM EVIDENCE at trial any information that documents not specifically mentioned in the Contract, including the LTIC Plan, governed Diab's annual right to receive annual stock options at his election.

[May 28, 2009 Opinion & Order, Doc. No. 68, pp.6-7]. Also in that Opinion & Order, the Court found that "[t]he only issues which remain for trial by the parties are: 1) Defendant's alleged breach of the Contract; 2) waiver by Diab; and 3) damages." *Id*. at 7.

Relying upon the Court's May 28, 2009 Opinion & Order, the Defendants now argue that the Court should strike from evidence the written opinions or oral testimony of Mr. Barry Grant

---

[1] Diab's claim for promissory estoppel was dismissed at the summary judgment phase after the Court ruled as a matter of law that Diab's right to stock options was governed exclusively by his contractual relationship with his employer.

("Grant"), a CPA who prepared an expert report setting forth the method by which to evaluate Diab's damages in this case. Diab seeks to offer live testimony and/or the written report of Grant during trial, in support of their claim for money damages. The Defendants argue that "because Mr. Grant's opinion is based on the terms and provisions of the LTIC Plan and other evidence that is extrinsic to the terms of the offer letter, the Court should strike Grant's expert report from evidence and prevent him from testifying." [Doc. No. 69, p.3].

ANALYSIS

The Defendants's instant motion misconstrues the scope of the Court's May 28, 2009 Opinion & Order. As quoted *supra*, the May 28, 2009 Opinion & Order merely prohibited the parties from proffering evidence *that a document other than the Contract controlled Diab's right to receive stock options*.

Defendants first made issue of the discretion vested within the Long-Term Incentive Compensation ("LTIC") Plan in their Motion for Summary Judgment [Doc. No. 47], arguing that the LTIC Plan reserved discretion in the Defendants to unilaterally amend Diab's stock options at any time. Therefore, Defendants argued, the LTIC Plan allowed the Defendants to award Diab stock options *or* restricted stock, or simply nothing at all, in the Defendants' sole discretion. [*See* Doc. No. 47, p.8].

The Court rejected the above argument by the Defendants in its November 6, 2008 Opinion & Order denying summary judgment, giving several reasons why, as a matter of law, Diab was entitled to annual stock options at his election under the plain and unambiguous terms of the Contract. [*See* Doc. No. 56, pp. 6-9].

In response to Diab's motion *in limine* [Doc. No. 65], Defendants again proffered

arguments regarding the Defendants' discretion to award Diab restricted stock pursuant to the terms of the LTIC Plan, not the Contract. *See, e.g.,* Doc. No. 66, p.3, ¶5 ("Defendants have consistently argued that any right Plaintiff had to receive further grants on an annual basis was pursuant to the terms of the Long Term Incentive Compensation Plan . . . Plaintiff's attempt now to foreclose Defendants from arguing their theory to the jury, while clever, is seriously flawed.").

As the Court had already construed the terms of the Contract as a matter of law during the summary judgment phase, the Court granted Diab's motion *in limine*, and held as follows:

> The Court EXCLUDES FROM EVIDENCE at trial any information denying the existence of a contract between Diab and the Defendants; EXCLUDES FROM EVIDENCE at trial any information denying that the contract required the Defendants to pay annual stock options to Diab; and EXCLUDES FROM EVIDENCE at trial any information that documents not specifically mentioned in the Contract, including the LTIC Plan, *governed Diab's right to receive annual stock options at his election*.

[Doc. No. 68, pp.6-7] (emphasis added). Notably, the Court *did not* exclude any documents, including the LTIC Plan, from being admitted as evidence at trial. Rather, the Court merely prevented arguments that Diab's "right to receive annual stock options at his election" was contingent upon the discretion claimed by the Defendants to reside in the LTIC Plan. Put another way, the Court's May 28, 2009 Opinion & Order [Doc. No. 68] *did not* preclude any party from referencing the LTIC Plan; the Court merely precluded the use of the LTIC Plan, or any other documents for that matter, in furtherance of arguments contrary to the Court's conclusions of law in the November 6, 2008 Opinion & Order regarding the terms of the Contract.

Grant's expert opinion, by its own admission, considered a number of documents in the preparation of damage calculations on this case. One of those documents was the LTIC Plan. However, as Diab argues, all Grant used the LTIC Plan for in preparing his report was "to

determine the exercise and vesting dates of stock options, *i.e.*, the terms and conditions for exercise of Diab's stock options had they been awarded to him." [Pl.'s Brief, Doc. No. 82, p.5]. Grant's expert report does not use the LTIC Plan to offer any opinion regarding Diab's right to receive stock options, the only use of the LTIC Plan the Court prohibited at trial in it's May 28, 2009 Opinion & Order. As such, Defendants' Motion to Strike [Doc. No. 69] is **DENIED**.

CONCLUSION

For the reasons explained above, the Court **DENIES** the Defendants' "Motion to Strike Plaintiff's Expert Witness and His Written Opinion" [Doc. No. 69].

IT IS SO ORDERED.

s/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: June 10, 2009

I hereby certify that a copy of the foregoing document was served upon counsel of record on June 10, 2009, by electronic and/or ordinary mail.

s/Jennifer Hernandez
Case Manager